ROBERT S. WOLFE

October 12, 2020

Councilmembers, City Manager, City Clerk & City Attorney
City of Hermosa Beach
1315 Valley Drive, Hermosa Beach, CA 90254

Re: City Council Virtual Meeting, October 13, 2020
Hermosa Fitness v. City of Hermosa Beach [Closed Session]
Item #25(a), Agenda #20-0666 –Possible Future Agenda Items

On September 24, 2020, Judge Mary Strobel filed her tentative decision granting Hermosa Fitness, LLC's (here called "CrossFit") petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.) The tentative ruling asserts that the court "will issue a writ directing City to set aside Resolution No. 18-7141."

This tentative ruling is being considered by the Hermosa Beach City Council, both in closed session and in connection with a request (Item #25a - Agenda #20-0666) for a possible future agenda item.

Agenda #20-0666 is based on a legally erroneous premise regarding the preclusive effect of any such writ during the pendency of a direct appeal As I explain, until the appellate process has been concluded, the answer is simple: There is none.

No one has to apologize for seeking appellate review of a lower court ruling that is reasonably believed to be fundamentally flawed. Indeed, that is the raison d'etre for California's system of appellate justice.

A word on my own background. I have been an appellate lawyer for more than 40 years. For roughly the first 20 years of my legal career, I worked as an appellate attorney in Downtown Los Angeles. In that capacity, I represented various public entities (including the County of Los Angeles, the City of Los Angeles, the City of Redondo Beach and the California Highway Patrol) in appeals involving government tort liability and federal civil rights under 42 U.S.C. section 1983.

I left private practice in late 1996 to work as a senior judicial attorney and ultimately as supervising judicial attorney at the California Court of Appeal for Division Three of the Fourth Appellate District (Orange County). Among other responsibilities, I headed the court's writ and motions staff, and acted as the court's judicial settlement officer, where I successfully mediated scores of appeals.

I retired from the Court of Appeal at the end of 2015. I now both live and work in Hermosa Beach. I remain an active member of the California State Bar.

I write this letter in my capacity as a resident, voter and taxpayer in the Hermosa Beach, and in the interests of promoting a civil and informed dialogue with the City, its public offices and staff, and among my neighbors. I write only on my own behalf. I do not purport to give legal advice or speak for anyone else. Please feel free to check my citations and analysis.

Judge Strobel issued her tentative ruling based on a single ground: an "unacceptable probability" that Councilmember Stacey Armato became "biased in favor of the complaining residents and against the Gym.

On appeal, Judge Strobel's determination is entitled to no special weight. It is accorded what is called "de novo" review as a question of law, not as a question of fact. Unlike an abuse of discretion standard, where the appellate court defers to the lower court's findings, the court here will make up its own mind, taking a fresh look. """With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal."""" (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169.)

CrossFit again will have the burden of persuasion on appeal to substantiate its claim of an unacceptable probability of actual bias on the part of Councilmember Armato. A mere suggestion of bias is not sufficient. "A [councilmember] has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance." (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780; see also *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205.)

Without going substantially into the merits, any appeal by the City raises critical issues of public policy regarding the ability of elective officials to communicate effectively and empathically with their constituents. In setting the appropriate balance, the Court of Appeal will draw its own conclusions, regardless of Judge Strobel's opinions.

Perhaps Yogi Berra – although not an appellate lawyer -- said it best: "It ain't over 'till it's over."

That is why California law does not apply the doctrine of issue preclusion (historically known as collateral estoppel) unless and until the appellate process has been concluded insofar as the matter at issue is concerned. (*Samara v. Matar* (2018) 5 Cal.5th 322; *People v. Burns* (2011) 198 Cal.App.4th 726, 731; see also Code Civ. Proc., §1049 ["An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."])

"The availability of a direct appeal reflects a sensible determination that the process culminating in a trial court's disputed decision is not sufficient to resolve litigation conclusively." (*Samara, supra*, 5 Cal.5th at p. 333.) "[F]airness, accuracy, and the integrity of the judicial system demand no less." (*Id.* at p. 335.)

Federal courts follow California's preclusion law with respect to judgments rendered by California courts. It is doubtful that Judge Strobel's decision will be considered to be "sufficiently firm" to be accorded preclusive effect while under review. (See *Luben Industries v.* U.S. (9th Cir. 1983) 707 F.2d 1037, 1040). Thus, it is likely that any further federal court proceedings will continue to be stayed until the California appellate proceedings have been completed.

California case and statutory law set out a complex series of rules regarding the impact of an appeal from a writ of administrative mandate upon the challenged administrative action, as well as which of its mandatory or prohibitory aspects are automatically stayed upon appeal.

The City is fortunate to have the benefit of the legal counsel from a experienced and highly competent city attorney in such matters. This is not the first time in which a public entity has been on the receiving end of such a writ. And it will not be the last.

The purpose of a closed session is to allow the city attorney to provide forthright legal advice without disclosure to the opposing party which is pursuing formal litigation against the city. (Govt. Code § 54956.9, subd. (d)(1).) "A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380.)

I will not attempt to gainsay such advice about appropriate next steps here.

Finally, Agenda Item No. #20-0666 requests a public hearing to consider whether Councilmember Armato should personally reimburse the City's past and future defense expenses in the ongoing CrossFit litigation.

Such a request is unprecedented in my four decades of practice in representing or working on appeals concerning governmental entities and/or their agents.

Most critically, it directly contravenes Government Code sections 825 and 995, which require public entities to defend and indemnify councilmembers and city staffers for any claims or actions arising out of acts or omission within the scope of their city responsibilities short of a showing of actual fraud, corruption or malice. (See *DeGrassi v. City of Glendora* (9th Cir. 2000) 207 F.3d 636 [city provided defense and indemnity to city councilmember in litigation for actions undertaken within the scope of her official duties].)

The request for reimbursement is objectively and subjectively frivolous.

I have full confidence in the appellate process, provided that both the City and CrossFit have a fair opportunity to present their legal arguments to the Court of Appeal. The judicial system is the forum where this matter should be resolved at this particular point in time.

Based on my own experience as an appellate mediator, the pursuit of a reasoned and good faith appeal furthers a negotiated resolution. But such a laudable effort can succeed only when the parties participate in good faith, outside the public spotlight. "Confidentiality is considered essential to effective mediation because it allows for frank and candid discussions by the parties without fear that adverse information presented during a mediation will be used against them later." (*Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, 1165.)

Agenda Item #20-0666 is the antithesis of these best practices. It will greatly prejudice the City's position, with no corresponding benefit. It is ill-timed and ill-spirited. I urge its swift and deserved rejection.

If any remorse or apologies are due, they run in a decidedly different direction.

Thank you for your consideration of this letter.

Sincerely,

Robert S. Wolfe